73-1207

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

PHILIP T. BERKLEY, DBA BERKLEY ASSOCIATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PHILIP T. BERKLEY IN PRO-PER
132 West Broadway
San Diego, California 92101

Telephone (714) 233-7945

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Philip T. Berkley, petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit which affirmed the judgment of the United States District Court for the Southern District of California.

OPINIONS BELOW

A summary judgment of United States District Court for the Southern District of California was

rendered in June 1972 Civil Action No. 72-19-CH. The amount of penalty of $8,000.00 and an injunction, were rendered by Judge William B. Enright and filed September 25, 1972 Civil Action No. 72-19-E; said judgment and injunction were affirmed by the United States Court of Appeals for The Ninth Circuit, Case No. 73-1070, and filed September 5, 1973.

JURISDICTION

The judgment of the Court of Appeals was entered September 5, 1973; there was no hearing for oral argument in accordance with this Court's Rule 3(a). The Petitioner's Petition For Rehearing In Banc Pursuant to Rule 35B Federal Rules of Appellate Procedure, dated September 18, 1973, was denied and filed as rejected on October 29, 1973.

QUESTIONS PRESENTED

1. id the Court of Appeals err in affirming

said judgment and injunction?

2. Did it err in denying the Petitioner a hearing, so that he could defend himself orally against lies that counsel of the Respondent mentioned and signed in their brief Civil Action No. 72-19-CW "Proposed Findings of Undisputed Facts & Conclusions of Law Pursuant to Local Rule 3(e) 4(a) (c Tr 255), Paragraph 34 as follows:

> "As to the advertisements in the March 18, 1969 edition of the Los Angeles Times; the September 10, 1968 edition of the Los Angeles Times; the February 27, 1969 edition of the Journal of Commerce; and the September 12, 1968 edition of the Journal of Commerce:
> (a) Defendant was advised that these advertisements would violate the order, before the advertisements were disseminated." . . . .?

3. Does the denial of a hearing on Petitioner's original Appeal to the Ninth Circuit Court of Appeals and the denial of his Petition for Rehearing in Banc, violate the Due Process of Law?

4. Did the Court of Appeals err in holding that the Cease and Desist Order was violated after

negotiations were consummated as of April 24, 1967 in accordance with John Gordon Underwood's letter of this date, simply because there was no "Disclaimer" in the two newspaper advertisements which unlike the form letters, did not ask for money or aim to consummate a sale, but merely offered further information - information that would always contain the "Disclaimer"? (Copies of these two newspaper advertisements are herewith offered as Exhibit 1. The Cease and Desist Order is also herewith offered as Exhibit 2 so that the United States Supreme Court would determine whether the Court of Appeals erred in holding that the Cease and Desist Order was violated in these two advertisements.)

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides the right of the people (or citizen) to petition the Government for a redress of grievances.

The pertinent part of the Fourteenth Amend-

ment to the United States Constitution provides: "No person shall be deprived of life, liberty or property, without due process of law" - which was violated when a hearing and a Petition for a Rehearing were denied.

The pertinent part of the Eighth Amendment to the United States Constitution provides: Excessive fines should not be imposed. This penalty of $8,000.00 for the two newspaper advertisements as shown in Exhibit 1, is unreasonably excessive. The baseless unfounded statements of the Respondent disparage the Petitioner; and the suit and unjust penalty are a harassment that in effect denies his right to conduct his business honestly.

STATEMENT

The Petitioner asserts that the Cease and Desist Order of the Federal Trade Commission was signed in May 1966 with the understanding that its signing was no admission of guilt and

that negotiations would follow so that Petitioner's advertisements would be in compliance with the requisites of the Federal Trade Commission. These negotiations, which centered around the wording of the Petitioner's form letter and Descriptive Price List, - which both mentioned prices for the purpose of consummating a sale - were consummated on April 24, 1967 and primarily involved a "Disclaimer". The Petitioner soon after signing the order in May 1966, submitted many form letters with different wordings in his effort to comply with the Order, but all these letters were rejected. The Petitioner then hired an attorney to help him with the wording, but all the letters submitted by the attorney were also rejected. There was absolutely no cooperation from the Commission as to how the wording should be phrased to meet their requisitesuntil Joseph W.Shea, then Secretary of the Federal Trade Commission sent

his letter to Petitioner dated March 3, 1967 in which he suggested the wording which is now known as the Disclaimer. At this time the Petitioner did not have any newspaper advertising in mind, although he was well aware that what applied to his form letters which always mentions prices and endeavored to consummate a sale, also applied to newspaper advertisements. All negotiations and correspondence previous to April 24, 1967 are therefore irrelevant and tended to confuse the Court with respect to violation of the Cease and Desist Order after this date April 24, 1967. Since this date of April 24, 1967 there was absolutely no correspondence between the Petitioner and the Federal Trade Commission. The Petitioner always used this Disclaimer in all his form letters and mailings since they always quoted prices and aimed to consummate a sale; he also always used this Disclaimer in all his newspaper advertisements where prices were quoted

and a sale could be consummated; only when no prices were quoted and a sale could not be consummated because only further information was offered, he did not use the Disclaimer, since it would be included in the further information offered, before any sale was possible. Under these circumstances the Petitioner should not have been penalized ₱8,000.00 for the two advertisements that he ran twice as shown in Exhibit 1. The Supreme Court is also requested to refer to the Cease and Desist Order shown in Exhibit 2 to see for themselves that the Order was not violated by these two newspaper advertisements; it should be noted that there is nothing in these two advertisements that violate the Order, as for example Paragraph (a) of the Cease and Desist Order, since nothing is mentioned in said newspaper advertisements to the effect that actual trades were made but simply what the Table of Trades shows - i.e., in the present tense. Seventy-six Affidavits

have been presented to prove that neither of these two advertisements were misleading. (See 76 Exhibits 1 to 76 (c Tr 306 to 314; 319 to 352; 358 to 374; 378 to 390; 400-402.) The Petitioner has the originals of these Affidavits in his possession. Furthermore, no sale was possible until a request for further information was made - and the further information always contained the Disclaimer as mutually agreed upon. With reference to Paragraph b of the Order it is quite obvious that nothing was mentioned in either advertisement that profits or earnings resulted from actual trades. As for Paragraph d, it is also very obvious that no mention is made of persons deriving profits or earnings from the Petitioner's Methods or through his Advisory Service or Managed Account Service.

In view of the aforementioned facts, the action of the Respondent to start suit in January 1972 against the Petitioner after a lapse of 4

years and eight months, since the mutual agreement of April 24, 1967, a period in which there was no correspondence with the Federal Trade Commission, - is an act of undue harassment extremely unfair to the Petitioner, and by affirming a penalty of $8,000.00 without giving him an opportunity to defend himself against blatant lies such as the statement in Respondent's brief Proposed Findings Of Undisputed Facts and Conclusions of Law Pursuant to Local Rule 3(e) 4(a) (C Tr 255) (a)"Defendant was advised that these advertisements would violate the Order before the advertisements were disseminated" - is an act of injustice, excessive penalty and tyranny inimical to the principles of democracy. Naturally, when the Ninth Circuit Court of Appeals read this blatant lie, and the Petitioner was not given an opportunity for a hearing to orally deny it, and insists that it is false and challenges the Plaintiff to produce something to

sustain this obnoxiously false statement, they, the Ninth Circuit Court erred in affirming said judgment of $8,000.00. This amount of $8,000.00 is so exorbitant in view of the obvious innocence of intentions and in fact, of the Petitioner who has endeavored to exercise the highest integrity in his business; in view of the fact that the Petitioner's business earnings for the years 1965 through 1971 averaged $5,466.00 (c Tr 76 Paragraph 22), while his average business earnings for 1972 and 1973 were low enough to justify his retention of Social Security payments that he has received during these two years; even if a penalty were justified (which it was not), the penalty of $8,000.00 is a violation of the Eighth Amendment of the United States Constitution - Excessive fines should not be imposed. It is also quite evident that the Judges of the Ninth Circuit Court of Appeals erred because they were misled by irrelevant statements in Respondent's brief -

statements that were irrelevant because they pertained to periods that were obsolete in the sense that they involved negotiations previous to the mutual agreement that consummated all negotiations, i. e., the letter by John Gordon Underwood dated April 24, 1967. For example, in Respondent's brief "Response To Appellant's Reply Brief", Page 2, last paragraph, they refer to (c Tr108) which pertains to an advertisement that was used in 1964 since this advertisement mentions results from 1948 through 1963; on last line of this page Respondent refers to (c Tr 425) which pertains to a letter dated May 11, 1966 from Berry W.Stanley which the Court will note is dated May 31, 1966, i.e., many months before the negotiations were consummated on April 24, 1967 as mentioned.

The contributing cause for this miscarriage of justice may be in the fact that the Petitioner's former attorney, Michael S.Evans, who

represented him at the initial hearing, was erroneously of the opinion that the Cease and Desist Order was violated - an opinion that was in conflict with that of the Petitioner who always felt that said Order was not violated. Despite this difference of opinion, said attorney in his brief to the U.S.District Court, Southern District of California, Civil Action No. 72-19-CW admitted violation of the order.

Under these circumstances a judgment was rendered against the Petitioner by Judge J. Clifford Wallace, although the amount of the judgment was to be determined at the next hearing. As a result of this conflict of opinion, the Petitioner discharged said attorney and acted in Pro-Per at the next hearing under Judge William B. Enright Civil Action No. 72-19-E, who rendered the penalty of $8,000.00. Because of the attorney's erroneous opinion and defenseless brief admitting violation of the Order, an unjust precedent or prejudice was

established in this case. Therefore, it is likely that the United States District Court that set the penalty of $8,000.00 and the Ninth Circuit Court of Appeals who affirmed it were influenced by an unjust precedent caused by the Plaintiff's mistaken attorney at the initial hearing. Therefore, it behooves the Supreme Court to grant this Petition For A Writ Of Certiorari so that justice is sustained and said violations of the Eighth & Fourteenth Amendment to the Constitution are prevented.

In view of the aforementioned facts as they pertain to the Cease and Desist Order and the newspaper advertisements as shown in Exhibit 2 and Exhibit 1 respectively, there has been undue and unjustified harassment of the Petitioner which in effect denies him the right to conduct his business peacefully and honestly and disparages his business activities by unfounded statements such as those alleging or implying misleading and deceptive

practices; there are also false statements by the Respondent containing or implying a lack of cooperation and failure to heed the advice and instructions of the Federal Trade Commission in regard to newspaper advertisements that were supposedly submitted to the Federal Trade Commission and they, the Commission, supposedly advised the Petitioner that these newspaper advertisements would violate the Cease and Desist Order, before the newspaper advertisements were disseminated, - a statement which is absolutely untrue and therefore cannot be sustained by any evidence whatsoever. Therefore, every member of the House of Representatives and Senate Judiciary Committees has been mailed a copy of this brief to make them aware of what has gone on and could continue to go on through the Federal Courts and Justice Department; perhaps an investigation will help prevent such injustices and constitutional

violations.

REASONS FOR GRANTING THE WRIT

1. To prevent a miscarriage of justice that could be used as a precedent.

2. To prevent violation of the Eighth and Fourteenth Amendments to the Constitution.

3. To prevent and discourage Counsel for the Justice Department to make false and irresponsible statements for the sake of winning a case, while the principles of truth, righteousness and justice are subordinated.

4. To prevent and discourage Federal Judges from ignoring well-founded charges of falsehoods and unfounded statements by a Respondent - (in this case the United States of America Counsel) - and thus being swayed by these falsehoods and unfounced statements. The Court of Appeals paid no heed to the said charges of the Petitioner, but instead denied a hearing and a Petition For A Rehearing despite said charges

of falsehood and unfounded statements. It was an error of the Court of Appeals to ignore these charges.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition For A Writ of Certiorari should be granted.

Respectfully submitted,

Philip T. Berkley

PHILIP T. BERKLEY IN PRO-PER

PORK BELLIES SHORT TERM NO. 1
and
SOYBEANS SEASONAL NO. 4R
BOTH GUARANTEED METHODS

FREE ADVISORY SERVICE on PORK BELLIES SHORT TERM NO. 1 whose Table of Trades shows 54 consecutive profits since January, 1965 and on SOYBEANS SEASONAL NO. 4R whose Table of Trades shows the tremendous net profit of $145,694.00 based on trading units of only one contract Soybeans since 1950. We feel sure you will be most enthusiastic by this unprecedented offer -- the best ever made in commodity futures. For further information mail the form below (form omitted)

And several months later, appellant placed advertisements without disclaimers in the February 27, 1969, edition of the Journal of Commerce (C. Tr. 70), and the March 18, 1969 edition of the Los Angeles Times (C.Tr.67). In these identical advertisements, appellant represented:

FREE ADVISORY SERVICE ON COMMODITY FUTURES based on the application of the BERKLEY TRADING METHODS whose Tables of Trades show better than a 90% Profit Ratio. Let us send you FREE our descriptive list of 31 Commodity Trading Methods for all year round trading. For more details fill in the form below: (form omitted)

EXHIBIT 1

a. Representing, directly or indirectly, that respondent's "Methods" or rules have been in existence for as long as fifteen years; or misrepresenting the extent, if any, to which past experience suggests or demonstrates the validity of respondent's "Methods" or rules.

b. Representing, directly or indirectly, that any stated profits or earnings resulted from actual trades based on respondents "Methods" or rules, or that they could have been predicted on the basis of said "Methods" or rules, or were typical or could be expected generally by persons employing said "Methods", rules or services in the future.

***

d. Misrepresenting in any manner, or by any means, the profits or earnings derived by persons making use of respondent's "Methods" or rules for dealing in commodity futures or of respondent's advisory service or managed accounts service.

EXHIBIT 2

APPENDIX

ENTERED
SEP 26 1972

FILED
SEP 25 1972

Clerk, U.S.
District Court
Southern District
of California

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. PHILIP T. BERKLEY, dba BERKLEY ASSOCIATES, Defendant.	Civil No. 72-19-CW Final Judgment

Summary judgment in this case having been entered in favor of plaintiff; the Court having scheduled a hearing to determine the appropriate relief; due notice of the hearing having been given to the respective parties; the hearing having been

held in open court on August 31, 1972, with defendant and counsel for the plaintiff present and participating; and, the Court having examined the files and considered the statements of the parties, and being fully advised in the premises,

HEREBY ORDERS, ADJUDGES AND DECREES that:

I.

Judgment is entered in favor of plaintiff, the United States of America, and against defendant, Philip T. Berkley, in the amount of Eight Thousand Dollars ($8,000.00) and the costs of this action, payable to the Treasurer of the United States.

II.

Defendant, Philip T. Berkley, an individual trading as Berkley Associates, or under any other name or names, and defendant's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of publications on "Methods" or rules for dealing in commodity

futures, or of advisory and managed accounts services for dealing in commodity futures, or of any similar or related publications or services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. Representing, directly or indirectly, that defendant's "Methods" or rules have been in existence for as long as fifteen years; or misrepresenting the extent, if any, to which past experience suggests or demonstrates the validity of defendant's "Methods" or rules.

b. Representing, directly or indirectly, that any stated profits or earnings resulted from actual trades based on defendant's "Methods" or rules, or that they could have been predicted on the basis of said "Methods" or rules, or were typical or could be expected generally by persons employing said

"Methods", rules or services in the futures.

c. Representing, directly or indirectly, that the application of defendant's "Methods", or rules in the managed accounts service results in higher profits for customers than would be ordinarily realized.

d. Misrepresenting in any manner, or by any means, the profits or earnings derived by persons making use of defendant's "Methods" or rules for dealing in commodity futures or of defendant's advisory service or managed account service.

III.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the interpretation,

construction or modification of this Final Judgment, for the enforcement of compliance therewith or for the punishment of violations thereof.

Dated: September 22, 1972.

(signed) WILLIAM B. ENRIGHT
United States District Judge

FILED
SEP 5 1973
CLERK
U.S.COURT
OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff - Appellee,	)	
	)	
vs.	)	No. 73-1070
	)	
PHILIP T. BERKLEY, et al,	)	MEMORANDUM
	)	
Defendant - Appellant.	)	
	)	

Appeal from the United States District Court
for the Southern District of California

Before: MERRILL, TRASK and CHOY, Circuit Judges

Berkley, a self-taught securities analyst advertised that for a small fee he would share his market secrets. The Federal Trade Commission deemed his advertising false, deceptive and misleading and filed an administrative complaint against Berkley pursuant to section 5(a)(1) Federal Trade Commission Act, 15 U.S.C. 45(a)(1). A consent cease and desist order was entered in that proceeding in May, 1967.

Between May, 1967 and April, 1968, Berkley submitted thirteen compliance reports to the Com-

mission with proposed advertisements attached to each as exhibits. The Commission instructed him that the proposed advertisements must make clear that his "methods" accounted for past market fluctuations and were substantially different from rules that would enable one to predict future market behavior (the disclaimer).

In 1968 and 1969, Berkley placed further advertisements without the disclaimer included. The Commission sued for civil penalties and injunctive relief for violation of the cease and desist order. The district court granted summary judgment for the government and awarded the Commission $8,000 in civil penalties and an injunction enforcing the order. We affirm.

Appellant contends that the Commission should have warned him further before suing him. We disagree. United States v. ITT Continental Baking Co., 1972 CCH Trade Cases 73,993, p. 92, 129 (D.C. Colo. 1971), cross appeals docketed No.'s 72-1072, 72-1073, 10th Cr. See also Federal Trade Commission

v. Colgate - Palmolive Co., 380 U.S. 374, 393-394 (1965). The latter advertisements violated the consent cease and desist order and the district court correctly so held.

We do not reach the question of the jurisdiction of the district court to issue the injunction, which the government raises. The appellant did not make it an issue on appeal.

Affirmed.

FILED
OCT 2[illegible] 1973
CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, vs. PHILIP T. [illegible], et al, Defendant - Appellant.	)	No.73-1070 ORDER

Before: MERRILL, TRASK and CHOY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

In the slip sheet Memorandum issued on September 5, 1973 there shall be substituted for the words and figures "May, 1967 and April, 1968" the words and figures "June, 1966 and April, 1967."